PUBLIC PROSECUTOR

v.

SARJEET SINGH A/L HALBAN SINGH & ANOR.

HIGH COURT, TAIPING
DATO' HAJI ABDUL MALIK BIN HAJI ISHAK JC
[CRIMINAL APPEAL NO. 51-241-92 (90)]
26 FEBRUARY 1994

***CRIMINAL LAW**: Identification parade - Necessity of holding identification parade - Offence of armed robbery - Victim was not requested by prosecution to identify accused persons in Court during trial - Accused persons not previously known to victim - Effect of not holding identification parade - Credibility of witnesses on point of identification.*

EVIDENCE: Accomplice - Uncorroborated testimony of an accomplice - Whether corroboration of accomplice evidence needs to be independent corroboration to every factor of case against an accused.

In this case, both the accused persons were acquitted and discharged at the close of the prosecutions's case on the charge of armed robbery under s. 392 of the Penal Code read together with s. 34 of the same Code. Another accused Mustafa Jaafar who had earliar pleaded guilty and was convicted, gave evidence for the prosecution

Held:

[1] As there was no evidence that the taxi driver (victim) knew the accused persons prior to the robbery, the police should have conducted an identification parade. Failure to organise one gives rise to the lurking suspicion that if the identification parade was conducted the taxi driver could not have indentified the accused persons.

[2] The learned Magistrate considered the evidence of Mustafa Jaafar in its entirety and came to the conclusion that he was an unreliable witness, and even if there was corroboration the evidence of Mustafa Jaafar could not be considered corroborated.

[3] On examining this case in its proper perspective, there is no ground for interfering with the decision of the learned Magistrate.

[Appeal by DPP dismissed].

Cases referred to:

Raymond Turnbull & Ors. [1976] 63 Cr. App. R. 132 ***(refd)***

Mehtab Singh & Ors. v. The State of Madhya Pradesh [1975] AIR SC 274 ***(refd)***

Lajja Ram v. State [1955] AIR ALL 671; [1955] Cr. L J 1547 ***(refd)***

Awadh Singh v. State [1954] AIR Pat 483; [1954] Cr. L J 1546 ***(refd)***

Goh Khiok Phiong v. Regina [1954] 20 ML J 223 ***(refd)***

Abdul Rahman v. Public Prosecutor [1940] 9 MLJ (FMSR) 55 ***(refd)***

Ng Yau Thai v. Public Prosecutor [1987] 2 MLJ 214 SC ***(refd)***

Rex v. Baskerville [1916] 2 KB p. 658 ***(foll)***

Sarwan Singh v. State of Punjab [1957] AIR SC 637, 641 ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 133

Penal Code, ss. 34, 133, 392

For the appellant - Yong Zarida, DPP

For the first respondent - Gurbachan Singh; M/s. Bachan & Kartar

For the second respondent - Ravindran; M/s. A. Xavier, Ravi & Sarjit

JUDGMENT

Haji Abdul Malik bin Haji Ishak JC:

The respondents were tried jointly in the Magistrate's Court, Taiping, Perak on the following charges:

Sarjeet Singh A/L Halban Singh
(TSA 71-9-86) and (TA (1) 92-244/87)

> That you on 14 May 1986 at about 1.45 a.m. at Chinese Cemetery Area, two and the half milestone, Kamunting Road, Taiping, in the District of Larut and Matang, in the State of Perak, committed robbery of (1) cash RM80 (2) a gold ring valued at RM150 and (3) a Seiko watch valued at RM30, the property of Lim Soon Eng KP. 4257575, between the hour of sunset and sunrise and at the time of commiting the said robbery you were armed with a deadly weapon, to wit, a knife and that you have thereby committed an offence punishable under s. 392 of the Penal Code read together with s. 34 of the same Code.

Roslan Bin Ali
(TA (1) 92-245/87)

> That you jointly with two others, namely Sarjeet Singh a/l Halban Singh and Mustafa Ja'afar who have already been dealt with, on 14 May 1986 at about 1.45 a.m. at Chinese cemetery area, two and the half milestone Kamunting road, Taiping, in the District of

> Larut and Matang, in the State of Perak, committed robbery of (1) Cash RM80 (2) a gold ring valued at RM150 and (3) a Seiko watch valued at RM30 the property of Lim Soon Eng IC NO. 4257575, between the hour of sunset and sunrise, and at the time of committing the said robbery you were armed with a deadly weapon, to wit, a knife and that you have thereby committed an offence punishable under s. 392 of the Penal Code read together with s. 34 of the same Code.

The learned Magistrate acquitted and discharged both the respondents at the close of the prosecution's case. The Public Prosecutor appealed against that order.

From the notes of proceedings, the following salient facts emerged.

Both the respondents and one Mustafa Ja'afar were army personnel attached to Sekolah KOR Perkhidmatan at Kamunting, Taiping, Perak. All three decided to commit robbery and towards this end, Sarjeet Singh hatched a plan to rob a taxi driver near the Chinese cemetery - this plan was eventually agreed upon by all three of them. Thus, on 14 May 1986 all three proceeded to Taiping town and from there they hailed a taxi to return to Kamunting. Mustafa Ja'afar sat at the front of the taxi next to the taxi driver, while Roslan bin Ali sat behind Mustafa Ja'afar. Sarjeet Singh, on the other hand, sat behind the driver of the taxi. It was alleged by Mustafa Ja'afar (he pleaded guilty earlier on and was convicted and he gave evidence for the prosecution) that Sarjeet Singh was armed with a knife and with it he threatened the taxi driver, one Lim Soon Eng. Sarjeet Singh too was said to have relieved the taxi driver of cash amounting to RM80, a ring and a Seiko watch. In short, Sarjeet Singh was said to play an active role in the robbery. However, the taxi driver gave evidence to the contrary - to the effect that it was the person who sat next to him (by necessary inference it must be Mustafa Ja'afar) that held the knife to his stomach. The taxi driver described the three robbers as Malays by relying solely on their dark skin complexion and the fact that they spoke in Bahasa Malaysia. At no time did the taxi driver identify the trio as the culprits. No evidence was led that there was in fact an identification parade organised by the police to enable the taxi driver to identify the trio. It is apparent that the necessity for holding an identification parade in this case was not appreciated by the police. The taxi driver testified that that night at the Chinese cemetery when he was told to alight from the taxi, the place was quiet and dark. This fact must have been known to the police before the case came up for hearing and, if known, the police should have been alerted as to the necessity of holding an identification parade. Under the darkness of the night, how could the taxi driver see and subsequently identify the trio? It was therefore no surprise at all that the taxi driver was not requested by the prosecuting officer to identify the trio in Court on the day of the hearing. This was, indeed, an unsatisfactory feature of the case.

That night, the taxi driver must have been frightened. There was evidence that he was afraid that he would be murdered. Under such circumstances, the pertinent questions put by the Lord Chief Justice in the judgment of the Court of Appeal in *Raymond Turnbull & Ors.* [1976] 63 Cr. App. R. 132 especially at p. 137 need to be referred to. They are as follows:

> Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example, by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long had elapsed between the original observation and the subsequent identification to the police?

Perusing through the notes of evidence, the taxi driver came no where near the sage observations of the Lord Chief Justice in *Raymond Turnbull & Ors. (supra).*

In my judgment, the necessity for holding an identification parade can only arise where the accused persons are not previously known to the witnesses (see *Mehtab Singh and Ors. v. The State of Madhya Pradesh* [1975] AIR SC 274). It follows therefore that where the accused persons are already known to the witnesses, the question of identification parade does not arise. Here, there was no evidence that the taxi driver knew the trio prior to the robbery. Therefore, the police should have conducted an identification parade and the failure to organise one gives rise to the lurking suspicion that if conducted the taxi driver could not identify the trio. Non-holding of the test identification parade,

though may not be a ground to vitiate the trial, is undoubtedly a very important feature in considering the credibility of the witnesses on the point of identification (see *Lajja Ram v. State* [1955] AIR ALL 671; [1955] Cr. LJ 1547 and *Awadh Singh v. State* [1954] AIR Pat 483; [1954] Cr. LJ 1546).

So much for the identification parade.

Next, the question to consider is whether the learned Magistrate was right in treating Mustafa Jaafar, a material prosecution witness, as an unreliable witness. Towards this end, Mr. Gurbachan Singh for the first respondent went through the evidence with a toothcomb. He referred to me, *inter alia*, the evidence which showed the character of Mustafa Jaafar who admitted unashamedly that he lied while under oath. The transcript reads thus:

Peguambela (1):	This shows you were dishonest to the Court?
Mustafa Jaafar:	Ini saya tak berapa jujur. Saya mengaku saya bohong.
Peguambela (1):	Bohong atas sumpah?
Mustafa Jaafar:	Diam diri. Saya tak berapa boleh jawab soalan ini. Saya mengaku saya bohong atas sumpah.

Thus, it is quite obvious that Mustafa Jaafar lied in Court for reasons best known to him and it was perfectly in order for the learned Magistrate to hold him as an unreliable witness.

The learned Deputy Public Prosecutor argued forcefully and sought to justify her submission that Mustafa Jaafar was a perfectly reliable witness by relying on certain passages in the notes of evidence. With respect, those passages heightened further the position of Mustafa Jaafar as an unreliable witness.

Without a doubt Mustafa Jaafar was an accomplice (*Goh Khiok Phiong v. Regina* [1954] 20 MLJ 223 and *Abdul Rahman v. Public Prosecutor* [1940] 9 MLJ (FMSR) 55) and the Court is entitled to presume that he is unworthy of credit unless he is corroborated in material particular. Although s. 133 of the Evidence Act, 1950 enacts that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice, yet our Courts have consistently held that the grounds of decision must reflect an awareness of the danger of so convicting (*Ng Yau Thai v. Public Prosecutor* [1987] 2 MLJ 214 SC). Corroboration of an accomplice evidence need not mean independent corroboration to every factor of the case against the accused. It is sufficient, in my judgment, if the corroboration corroborates some material part of the accomplice's story which identifies the accused with the offence charged and goes towards the identity of the accused. Lord Reading CJ aptly said it in *Rex v. Baskerville* [1916] 2 KB p. 658, especially at p. 667 thus:

> We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offences for which corroboration is required by statute.

Further down the same page, Lord Reading CJ said:

> It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused.
>
> The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime.

In my judgment, the credibility of Mustafa Jaafar who is in the position of an accomplice must be individually judged just as any other witness - applying the same considerations but with an added ingredient that he is an accomplice. The Court must take stock of the situation and consider who and what he is, his demeanour, bearing, the manner, quality and substance of his evidence in itself and in relation to all the circumstances of the case. The nature, quality and degree of Mustafa Jaafar's complicity must be examined thoroughly. It goes without saying that though Mustafa Jaafar is an accomplice, he is still a competent witness and as such is entitled to have his credibility judged in itself; his evidence must as a whole be weighed and examined and not just put aside unjudged and unconsidered just because he is an accomplice.

The learned Magistrate considered the evidence of Mustafa Jaafar in its entirety and came to the conclusion that he was an unreliable witness, and that even if there was corroboration the evidence of Mustafa Jaafar could not be corroborated. I cannot find any fault with the approach adopted by the learned Magistrate. On this point, the Supreme Court of India in *Sarwan Singh v. State of Punjab* [1957] AIR SC 637, 641 held that:

> ...before the Court reaches the stage of considering the question of corroboration and its adequacy or otherwise, the first and initial and essential question to consider is whether even as an accomplice the approver is a reliable witness. If the answer to this question is against the approver then that is the end of the matter, and no question as to whether his evidence is corroborated or not falls to be considered.

I have examined this case in its proper perspective and I am a unable to see any ground for interfering with the learned Magistrate's decision.

RE: BABY M (AN INFANT) (ADOPTION: CONSENT)

HIGH COURT, KUALA LUMPUR
DATO' DR. VISU SINNADURAI J.
[ADOPTION APPLICATION NO. 34-01-93]
[TOGETHER WITH ORIGINATING SUMMONS NO. 24-928-93]
13 JUNE 1994

FAMILY LAW: Adoption - Consent of natural parents - Natural parents retracted consent given to adoptive parents - Whether withholding of consent unreasonabe - Whether consent to be dispensed with - Test - Whether that of hypothetical reasonable parent - Welfare of child - Whether welfare of child a paramount factor - Adoption Act 1952 (Revised 1981) s. 5.

This was an application by Mr. and Mrs. A for an order that they be allowed to adopt a baby girl, M, who had been handed over to them for adoption by the natural parents, on the ground that the requirement of consent of the natural parents for the proposed adoption, being unreasonably withheld by the said natural parents, ought to be dispensed with.

The facts were that prior to the birth of M, by some arrangements made between Mrs. A and the natural mother, it was agreed that after birth, the infant would be given to Mrs. A for adoption. In pursuance thereof, on 21 September 1993, about one month after the birth of the infant, both Mrs. A and the natural parents consulted a solicitor to commence proceedings for the adoption of the infant, and following that a letter of consent was executed by the natural parents giving their formal consent to the adoption of the infant by Mr. and Mrs. A. With a view to the infant's adoption, the natural parents then entrusted the infant to the care of Mr. and Mrs. A.

The natural parents subsequently changed their mind about giving up the child for adoption and on 29 September 1993 filed an originating summons seeking the return of the infant. In their affidavits they alleged that they had not given their consent and that if consent had been given it was invalid as the same had been withdrawn. Hence the aforesaid application by Mr. and Mrs. A.

The issue that arose was whether in the circumstances of this case parental consent ought to be dispensed with on the ground that it was being unreasonably withheld.